

# ***Litton v. NLRB*: Evolution of the Post-Expiration Duty to Arbitrate Grievances**

## **I. INTRODUCTION**

Although seemingly counterintuitive, contract provisions can, in some circumstances, outlive the contracts containing them. For instance, many binding arbitration clauses have survived the courts' scrutiny despite expiration of their underlying collective bargaining agreements. Over the years, courts have adopted and abandoned a variety of standards defining what constitutes a binding post-expiration duty to arbitrate grievances.<sup>1</sup> The Supreme Court's decision in *Litton v. NLRB*<sup>2</sup> clarified and arguably narrowed the circumstances in which post-expiration grievances may be subject to a binding arbitration clause. The *Litton* Court held that in order for a post-expiration grievance to be arbitrable, it must: 1) involve facts and occurrences that arose before expiration, or 2) stem from a right vested or accrued under the contract, or 3) pertain to a contractual right which, under ordinary contract interpretation, would survive the collective bargaining agreement.<sup>3</sup>

A brief review of the context in which collective bargaining occurs is necessary to understanding the Court's decision in *Litton*. Underlying the collective bargaining agreement is the unilateral change doctrine, which states that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition.<sup>4</sup> "Pending renewal or renegotiation of the collective bargaining agreement, the parties are prohibited by the National Labor Relations Act from unilaterally changing terms and conditions of employment established by mandatory bargaining subjects."<sup>5</sup> However, in *Litton*, the Court held that the unilateral change doctrine did not impose a statutory duty upon employers to arbitrate post-expiration grievances.<sup>6</sup>

The dispute in *Litton* focused on whether an arbitration clause in an expired collective bargaining agreement was binding during the hiatus between expiration and the signing of a new agreement. The union argued that, by refusing to arbitrate employees' post-expiration grievances, *Litton* had implemented a unilateral change without bargaining to impasse.

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1. See generally Paul Bosnac, *Expiration of the Collective Bargaining Agreement: Survivability of Terms and Conditions of Employment*, 4 LAB. L.J. 715 (1988).

2. 111 S. Ct. 2215 (1991).

3. *Id.*

4. Bosnac, *supra* note 1, at 715. Once the employer has bargained to impasse, it may then make a unilateral change in a mandatory subject. 29 U.S.C. § 158(a)(5) & (b)(3).

5. Bosnac, *supra* note 1, at 715 (citing *NLRB v. Katz*, 369 U.S. 736 (1962)).

6. 111 S. Ct. 2215 (1991).

Because a unilateral change had been made without bargaining to impasse, the union argued that *Litton* had committed an unfair labor practice.<sup>7</sup> Drawing upon the divergent standards devised by its predecessors, the *Litton* Court designated the three situations mentioned above as justifications for subjecting a grievance to an arbitration clause contained in an expired collective bargaining agreement.

This Note asserts that the three-pronged test in *Litton* creates fairer standards than those suggested by its predecessors for judging whether an arbitration clause survives expiration of a collective bargaining agreement. Section II establishes an historical context for analyzing *Litton* by discussing the primary cases leading up to the decision. Section III explains the factual context of *Litton* and analyzes the Court's holding. Section IV analyzes several decisions since *Litton*, focusing on how the *Litton* standards work in practice. Section V critiques the *Litton* standards and discusses their viability as indicators of the post-expiration duty to arbitrate. The conclusion suggests alternatives to, or modifications of, the *Litton* standards.

## II. PRIMARY CASES PRECEDING *LITTON*

### A. *NLRB v. Katz*<sup>8</sup>

In *Katz*, the employer unilaterally granted merit increases and changed sick-leave and wage-increase policies while it was engaged in contract negotiations on those matters with the union. The Court held:

It is a violation of the duty to bargain collectively imposed by [29 U.S.C. § 158(a)(5)] of the National Labor Relations Act for an employer, without first consulting a union with which it is carrying on bona fide contract negotiations, to institute changes regarding matters which are subjects of mandatory bargaining under [29 U.S.C. § 158(d)] and which are in fact under discussion.<sup>9</sup>

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7. What constitutes "impasse" is a matter of judgment. See Jacob Hart, *Fundamental Laws and Techniques of Collective Bargaining*, R 176 ALI-ABA 1235, 1247-48 (1992).

8. 369 U.S. 736 (1962).

9. *Id.* at 737. 29 U.S.C. § 158(a)(5) (1992) states that it is an unfair labor practice for an employer to refuse to bargain collectively. 29 U.S.C. § 158(d) defines the obligation to bargain collectively as: "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement. . . ."

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The Court asserted that the employer's unilateral action constituted a refusal to negotiate, contrary to the statutory duty to bargain collectively.<sup>10</sup> The effect of *Katz* was to compel maintenance of the status quo during the negotiation period following expiration. Finally, the Court conceded that although there might be an excuse or justification for unilateral action, none was presented in *Katz*.<sup>11</sup>

### B. Hilton-Davis Chemical Co. and Local 342<sup>12</sup>

The issue in *Hilton-Davis* was whether a party breaches its statutory obligation to bargain in good faith as to terms and conditions of employment by refusing to adhere to the arbitration procedures in an expired contract, without bargaining to impasse or acquiring the other party's consent to terminate the procedure.<sup>13</sup> The National Labor Relations Board (NLRB) found that Hilton-Davis had not breached its statutory duty under 29 U.S.C. § 158(a) to bargain in good faith by its post-expiration refusal to arbitrate.<sup>14</sup> The NLRB specified that the duty to bargain does create an obligation to meet and confer but does not create an obligation to agree to a proposal or to make a concession.<sup>15</sup> Consequently, Hilton-Davis was statutorily required to meet and confer on grievances arising during the hiatus but was not required to resolve such grievances through arbitration.<sup>16</sup> The NLRB stated that arbitration is strictly a "consensual surrender of the economic power which the parties are otherwise free to utilize."<sup>17</sup> Thus, *Hilton-Davis* defined arbitration as a "creature of contract," a voluntary surrender of power that does not outlive the underlying contract.<sup>18</sup>

### C. Nold Bros. v. Local No. 358, Bakery and Confectionery Workers Union<sup>19</sup>

In *Nolde*, the union exercised its right to terminate a collective

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10. NLRB v. Katz, 369 U.S. 736 (1962).

11. *Id.*

12. 185 N.L.R.B. 241 (1970).

13. *Id.* at 242.

14. *Id.* at 241.

15. *Id.* at 242.

16. *Id.*

17. 185 N.L.R.B. at 242.

18. Hilton-Davis Chem. Co. and Local 342, 185 N.L.R.B. 241 (1970).

19. 430 U.S. 243 (1977).

bargaining agreement. The employer subsequently closed its plant and refused to arbitrate the issue of the workers' entitlement to severance pay. The Court held that the dispute over severance pay "arose under" the expired collective bargaining agreement and was, therefore, subject to arbitration.<sup>20</sup>

The agreement in *Nolde* provided that "the contract was to remain in effect until July 21, 1973 and thereafter, until such time as either a new agreement was executed . . . or the existing agreement was terminated. . . ."<sup>21</sup> However, the Court concluded that the arbitration clause was not intended to end automatically with the contract.<sup>22</sup> The Court further stated that the strong presumption favoring arbitrability must be "negated expressly or by clear implication."<sup>23</sup> The language of the *Nolde* contract did not express or imply such a negation of the presumption. Thus, *Nolde* applied the "arises under" standard to determine the viability of post-expiration arbitration.

*D. American Sink Top & Cabinet Co. and Millmen-Cabinet Makers  
Industrial Carpenters Union Local No. 550*<sup>24</sup>

The union's complaint in *American Sink Top* was that the employer had unilaterally eliminated the grievance procedure under a recently expired collective bargaining agreement, thereby violating 29 U.S.C. § 158(a)(1) & (5).<sup>25</sup> Through application of a standard very similar to the *Nolde* "arises under" test, *American Sink Top* also permitted post-expiration arbitration. The Board found that the employer had violated the agreement and held that arbitration was permissible after the agreement's lapse if the dispute concerned an obligation arguably created by the expired agreement.<sup>26</sup>

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20. *Id.*

21. *Id.* at 246.

22. *Id.* at 253.

23. *Id.* at 250-51. The court also recognized that a party cannot be compelled to arbitrate any matter without a contractual obligation to do so but added that termination of a collective bargaining agreement did not automatically extinguish a party's duty to arbitrate grievances arising under that contract.

24. 242 N.L.R.B. 408 (1979).

25. *Id.*

26. *Id.*

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### *E. Indiana and Michigan Electric Co. and Local Union No. 1392*<sup>27</sup>

In *Indiana and Michigan*, the collective bargaining agreements expired, and the employer issued a statement to its unions that arbitration would not be used for grievances during the hiatus. The NLRB held that the employer's abandonment of initial arbitration was a unilateral change in the grievance procedure in violation of 29 U.S.C. § 158(a)(5). The NLRB stated that the policy of industrial peace was not served by "allowing one party to unilaterally alter or abandon the procedure by which the parties have customarily resolved disputes."<sup>28</sup> In addition, the NLRB reaffirmed *Hilton-Davis* for the notions that a commitment to arbitrate arises solely from mutual consent and that the National Labor Relations Act does not create a statutory obligation to arbitrate.<sup>29</sup> However, the NLRB disaffirmed the *Hilton-Davis* court's finding that an employer is free to abandon the arbitration procedure during a contractual hiatus.<sup>30</sup> Instead, *Indiana and Michigan* upheld the *Nolde* rule that an arbitration commitment survives in certain circumstances.<sup>31</sup>

### III. ANALYSIS OF *LITTON V. NLRB*<sup>32</sup>

#### *A. The Dispute*

The dispute in *Litton* centered around the post-expiration arbitration of grievances concerning a seniority clause for layoffs. The collective bargaining agreement provided that in the case of layoffs, seniority would be the determining factor, if other things such as aptitude and ability were equal. It also provided that any alleged violation of the agreement or construction of the contract would be referred to arbitration. Approximately one year after the agreement expired, the employer laid off six of its most senior employees. The union filed grievances alleging violations of the seniority clause, but the employer refused to comply with the agreement's grievance and arbitration procedure.<sup>33</sup> An Administrative Law Judge found that *Litton's* refusal to comply with the

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27. 284 N.L.R.B. 53 (1987).

28. *Id.*

29. *Id.* at 57.

30. *Id.* at 59.

31. *Id.*

32. 111 S. Ct. 2215 (1991).

33. *Id.* at 2219.

grievance and arbitration procedure violated 29 U.S.C. § 158(a)(1) & (5).<sup>34</sup> The NLRB affirmed in part and reversed in part, stating that a complete repudiation of the obligation to arbitrate any grievance after expiration violated 29 U.S.C. § 158(a)(1) & (5). However, it refused to order arbitration in this case because the grievance did not arise under the agreement.<sup>35</sup> The U.S. Court of Appeals for the Ninth Circuit ordered enforcement of the NLRB's order, except for the portion that held that the seniority clause disputes were not arbitrable. The court held that the seniority rights had arisen under the agreement and were, therefore, arbitrable.<sup>36</sup>

*B. Supreme Court*

The Supreme Court reversed the Court of Appeals to the extent that it had refused to enforce the NLRB's order in its entirety.<sup>37</sup> The Court refused to extend the unilateral change doctrine to impose a statutory duty to arbitrate post-expiration grievances.<sup>38</sup> In accordance with *Hilton-Davis*, the Court asserted that parties who want an arbitration clause to survive a contract should expressly provide for such a contingency.<sup>39</sup> Concluding that *Litton* was precisely within the *Nolde* rationale, the Court recognized the necessity of applying the "arises under" test.<sup>40</sup> The Court further defined the *Nolde* presumption favoring the arbitration of post-expiration disputes "arising under" the contract. The Court limited the presumption to three situations:

A post-expiration grievance can be said to arise under the contract only [1] where it involves facts and occurrences that arose before expiration, [2] where an action taken after expiration infringes a right that accrued or vested under the agreement, or [3] where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.<sup>41</sup> The Court found that

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34. *Id.*

35. *Id.* at 2219-20.

36. *Id.* at 2220.

37. *Litton v. NLRB*, 111 S. Ct. 2215, 2227-28 (1991).

38. *Id.* The court upheld *Hilton-Davis'* position that an arbitration clause does not, by operation of the NLRA, continue in effect after expiration of the collective bargaining agreement.

39. *Id.* at 2222.

40. *Id.* at 2225.

41. *Id.*

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none of the three standards applied and therefore imposed no duty to arbitrate upon *Litton*.

The Court also stated that although the NLRB could interpret collective bargaining agreements in unfair labor practice adjudications, it is neither the sole nor primary source of authority.<sup>42</sup> Arbitrators and courts are still the primary source of contract interpretation. For example, in *Litton* the Court first had to determine whether the parties had agreed to arbitrate the dispute before submitting it to an arbitrator for resolution of the underlying issue. Therefore, the Court held that the NLRB's decision not to order arbitration of the post-expiration grievances was not subject to substantial deference. The Court refused to defer to the NLRB because the decision was not based upon statutory authority of the NLRB but rather, was based upon the Board's interpretation of the collective bargaining agreement.<sup>43</sup>

### C. Dissent

Justice Marshall made two main points in his dissenting opinion. First, he asserted that the *Nolde* presumption applies whenever the parties' dispute is based on different perceptions of a provision of the expired contract.<sup>44</sup> This proposition stated a broader rule than the majority, which only applied the "arises under" test in three situations. Adoption of Justice Marshall's position would serve as a continuation of the vague standard produced by the *Nolde* "arises under" test. Second, Marshall stated that the question of post-expiration arbitrability should be determined by arbitrators and not by the courts. This argument is based on the assumption that arbitrators are better qualified to handle the issue of arbitrability.<sup>45</sup> Marshall's position would effectively force parties into arbitration as a means of resolving the issue of arbitrability. Both parties would suffer if the issue were ultimately found to be not arbitrable because resources would have been wasted on a process deemed to be an inappropriate means of resolution. Contrary to the majority's mandate of specific inclusion of arbitral extension beyond the life of the contract, Justice Marshall stated that parties who do not want post-expiration

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42. *Litton v. NLRB*, 111 S. Ct. 2215, 2223 (1991).

43. *Id.*

44. Paul F. Hodapp, *The U.S. Supreme Court Rules on Duty to Arbitrate Post-Contract Grievances*, 42 LAB. L.J. 827, 828 (1991).

45. *Litton v. NLRB*, 111 S. Ct. 2215, 2229 (1991).

arbitration must expressly exclude it from their contracts.<sup>46</sup> This essentially creates a reverse-*Nolde* presumption, requiring parties to actively evade arbitration.

#### D. Impact of *Litton*

One way to gauge the significance of *Litton* is to evaluate its impact on the viability of prior decisions. The most significant predecessor of *Litton* is *Nolde*. Although *Litton* further defined *Nolde*'s "arises under" test by articulating three situations in which it is applicable, *Litton* actually narrowed the *Nolde* test by limiting it to those three circumstances. This narrowing of the *Nolde* standard will enable parties and courts to clearly distinguish arbitrable and non-arbitrable issues.

The three standards of *Litton* comport with the *Hilton-Davis* "creature of contract" theory by limiting arbitration to situations which essentially are products of the original contract. However, in practice, they may extend beyond *Hilton-Davis* by permitting arbitration of issues which would be arbitrable under general principles of contract interpretation, whether or not such issues are expressly provided for in the arbitration clause. *Indiana and Michigan* is still valid to the extent that it comports with *Nolde* in mandating post-expiration arbitration when the dispute arises under the expired agreement. *Indiana and Michigan* also survives to the extent that *Hilton-Davis* is still viable. Although not abandoned, *Katz* is limited, in the arbitration context, to requiring maintenance of the status quo during the hiatus between expiration and formation of a new contract only if the dispute fits one of the *Litton* classifications. Although *Litton* did not uphold refusal to arbitrate as a *per se* statutory violation, as the Court in *American Sink Top* did, it did create some significant common law exceptions to an employer's right to decline post-expiration arbitration.

#### E. Practical Concerns

This author's primary concern is how the *Litton* standards will work in practice. One commentator argues that the *Litton* standards will create a new basis for litigation over arbitrability of post-expiration disputes because courts must first make an *ad hoc* evaluation of whether a right has vested or accrued before applying the "arises under" test.<sup>47</sup> It is also possible that *Litton*'s failure to establish a standard time frame for

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46. Hodapp, *supra* note 44, at 828.

47. *Annual Survey of Labor Law*, 33 B.C. L. REV. 305, 357 (1991-92).



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how long a party can wait after expiration to demand arbitration of post-expiration disputes will create a problem for both unions and employers in predicting whether arbitration will be enforced. Finally, *Litton's* failure to define "normal principles of contract interpretation" may prove to be a serious impediment to application of the standard.<sup>48</sup>

Although the third standard seems vague, courts should be able to generate adequate precedent to clarify the first two standards because they are an amalgamation of tests applied over the last thirty years. The best way to address such concerns is to analyze some of the recent district and appellate court decisions in which the *Litton* test has been applied or analyzed or both.

### IV. ANALYSIS OF POST-LITTON CASES

#### A. *Post Tribune Publishing, Inc. v. American Arbitration Ass'n, Inc.*<sup>49</sup>

In *Post*, the employer sought a declaration on the arbitrability of a post-expiration grievance. During the hiatus between the expiration of the old contract and agreement upon a new one, the union filed a grievance for the alleged failure of *Post* to allocate a certain assignment to its composing room employees. *Post* refused to submit the grievance to arbitration after its joint standing committee failed to resolve it.<sup>50</sup> The contract contained two pertinent provisions. First, it assigned grievances to a joint standing committee, and then, if the committee arrived at an impasse, grievances were referred to arbitration. Second, the contract stated that conditions prevailing at the expiration of the contract were to prevail during active negotiation of a new contract.<sup>51</sup>

The court held that because the contract provisions extended application of the contract after expiration, until the parties bargained to impasse or reached a new agreement, the arbitration clause applied to post-expiration grievances.<sup>52</sup> Although upholding the *Nolde* presumption of arbitrability because the contract specifically provided for post-expiration arbitration, the court recognized *Litton* for the premise that:

An arbitration clause will not by operation of the NLRA

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48. *Id.* at 358.

49. 767 F. Supp. 935 (N.D. Ind. 1991).

50. *Id.* at 938.

51. *Id.* at 937-38.

52. *Id.* at 949.

continue in effect after the expiration of a collective bargaining agreement. Arbitration is a matter of contract, and in the absence of a contract provision which eliminates a hiatus between the expiration of the old contract and the execution of the new contract, an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied.<sup>53</sup>

The court also acknowledged that the presumption of arbitrability does not apply indefinitely after the expiration of the collective bargaining agreement.<sup>54</sup> In *Post*, the court found that the contract sufficiently limited the duration of the post-expiration duty to arbitrate. The duty lasted during active negotiations, until reaching impasse or a replacement agreement.<sup>55</sup>

*Post* squarely applied part three of the *Litton* test, which provides that a grievance "arises under" an expired contract if it would survive expiration under normal principles of contract interpretation.<sup>56</sup> The arbitration clause in this case would clearly survive expiration under a normal construction of the underlying contract. The *Post* contract expressly stated that the arbitration clause was to extend through the hiatus between expiration and impasse or new agreement, as long as active negotiations were being conducted.<sup>57</sup> Thus, the concern over the ambiguity of what constitutes normal contract principles is resolved in this case by the express terms of the contract. The only reasonable construction of the contract is that the arbitration clause was meant to outlive the underlying contract.

**B. Cumberland Typographical Union No. 244 v. The Times and Alleganian Co.<sup>58</sup>**

The court in *Cumberland* held that an employer was required by the Labor Management Relations Act § 301(a)<sup>59</sup> to arbitrate a dispute,

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53. *Id.* at 947 (citing *Litton v. NLRB*, 111 S. Ct. 2215, 2221 (1991)).

54. *Post Tribune Publishing, Inc. v. American Arbitration Ass'n, Inc.*, 767 F. Supp. 935, 944 (N.D. Ind. 1991).

55. *Id.* at 945.

56. *Litton v. NLRB*, 111 S. Ct. 2215, 2225 (1991).

57. 767 F. Supp. 935, 945 (N.D. Ind. 1991).

58. 943 F.2d 401 (4th Cir. 1991).

59. 29 U.S.C. § 185 (1988).

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concerning a lifetime job guarantee provision, that arose under the expired collective bargaining agreement.<sup>60</sup> The court also cited *Litton* for the proposition that "[t]he cases interpreting *Nolde* have held that in order to 'arise under' an expired contract, a dispute must involve rights which to some degree have vested or accrued during the life of the contract."<sup>61</sup> Although this statement is an explanation of part two of the *Litton* test, it does not encompass parts one and three, "facts and occurrences arising pre-expiration" and "normal principles of contract interpretation." Perhaps, the court chose the "vested or accrued rights" standard of the *Litton* test as the most supportive of *Cumberland*. However, the same result could also be reached under the "normal principles of contract interpretation" standard. The court's recognition of *Litton* as holding that "arises under" means that a dispute must involve rights vested or accrued during the life of the contract is a disturbingly limited reading of the explicit three part test set forth in *Litton*. By not recognizing parts one and three of the test, the court misconstrues the true holding of *Litton* and effectively reverts to the more vague standard of *Nolde*.

### C. Cadillac Industries, Inc. v. Amalgamated Clothing & Textile Workers Union<sup>62</sup>

The court in *Cadillac* held that because *Litton* emphasized that arbitration requires contractual consent, a post-expiration employee discharge grievance did not have to be submitted to arbitration.<sup>63</sup> The court cited the three part test of *Litton* as the appropriate test of what "arises under" an expired collective bargaining agreement. Because the employee's right to be discharged only for just cause was a creation of the collective bargaining agreement and did not extend beyond expiration, arbitration was not required under "normal principles of contract interpretation."<sup>64</sup> The court noted that the right did not vest or accrue during the life of the collective bargaining agreement.<sup>65</sup> The facts of the case also reveal that the dispute did not arise out of pre-expiration facts or occurrences. Thus, none of the *Litton* standards for post-expiration survival were met.

The court also noted that *Litton* overruled *Nolde* to the extent that

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60. 943 F.2d 401, 402 (4th Cir. 1991).

61. *Id.* at 405 (quoting *Litton v. NLRB*, 111 S. Ct. 2215, 2225-27 (1991)).

62. 775 F. Supp. 30 (D. P.R. 1991).

63. *Id.* at 33.

64. *Id.*

65. *Id.*

*Nolde* presumed post-expiration arbitrability in the absence of express provisions to the contrary.<sup>66</sup> *Litton* held that parties who want arbitration clauses to extend beyond expiration must expressly consent to such extensions by agreement.<sup>67</sup> According to *Litton*, "a post-expiration dispute remains arbitrable only if the dispute has its real source in the collective bargaining agreement."<sup>68</sup> This decision appears to correctly interpret *Litton* by recognizing its reversal of the *Nolde* presumption of arbitrability.

D. *Kelly v. Mercoid Corp.*<sup>69</sup>

Although the holding in this case pertained to preemption, the court applied part three of the *Litton* test, "normal principles of contract interpretation," to a collateral post-expiration arbitration issue. The contract provided that the agreement "shall automatically renew itself from year to year thereafter, unless the Company or the Union gives written notice to the other party to amend, modify or terminate within not less than sixty (60) days prior to any expiration date."<sup>70</sup> Because neither party had given notice to the other, the court held that the agreement was effective.<sup>71</sup> The court noted that even if the agreement had expired, the parties' actions reflected a post-expiration intent to be bound by provisions of the agreement.<sup>72</sup> Based upon this intent, the court concluded that, under "normal principles of contract interpretation," the right to arbitrate had survived the contract.<sup>73</sup>

*Kelly* presented an unexpected application of part three of the *Litton* test in the context of preemption. The court did not make a clear showing of how it arrived at an application of *Litton*. Its footnoted reference to *Litton* simply stated that for reasons previously discussed, part three of the test was applicable.<sup>74</sup> Presumably, the reference to previous discussion pertained to the conduct of both parties, reflecting an intent to continue the grievance and arbitration procedure, despite expiration. A

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66. *Id.* at 32 n.3.

67. *Cadillac Indus., Inc. v. Amalgamated Clothing & Textile Workers Union*, 775 F. Supp. 30, 32 (D. P.R. 1991) (quoting *Litton v. NLRB*, 111 S. Ct. 2215, 2222 (1991)).

68. *Id.*

69. 776 F. Supp. 1246 (N.D. Ill. 1991).

70. *Id.* at 1251.

71. *Id.* at 1252.

72. *Id.* at 1251-52.

73. *Id.* at 1253 n.5.

74. *Kelly v. Mercoid Corp.*, 776 F. Supp. 1246, 1253 n.5 (N.D. Ill. 1991).

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further inference is that intent reflected by mutual conduct is a "normal principle of contract interpretation." Although the *Kelly* court did not find it problematical, the case presented an illustration of the elusiveness of standards such as "normal principles of contract interpretation."

*E. T & G Construction Co. v. Sheet Metal Workers' International Ass'n, Local 100*<sup>75</sup>

In this case, the court recognized the *Nolde* "arises under" test but then stated that arbitration clauses were excluded from the rule established in *Katz*, making it an unfair labor practice for an employer to effect unilateral changes in terms and conditions before bargaining to impasse.<sup>76</sup> Consequently, the court found that any grievance arising after the last possible expiration date would not be arbitrable. The court based this conclusion on *Litton's* assertion that an employer need not arbitrate a grievance "which arises after the collective bargaining agreement has expired but before the parties have bargained to impasse."<sup>77</sup>

The court also cited *Litton* for the proposition that "a party cannot be forced to arbitrate the arbitrability issue."<sup>78</sup> However, in this case, the court held that the contract provided for arbitration of the arbitrability issue.<sup>79</sup> The court further held that the Union's request for arbitration was untimely because not made within a reasonable time after the expiration of the collective bargaining agreement. Although, as a general rule, an arbitration clause can survive a collective bargaining agreement, the court felt that there was no reason why the general rule should be so absolute as to permit its abuse by a party that is unreasonably late in requesting arbitration. "The object of an arbitration clause is to implement a contract, not to transcend it."<sup>80</sup>

The *T & G* opinion failed to apply the three part test of *Litton*. Instead, it cited *Nolde's* "arises under" test.<sup>81</sup> Although it was apparent that the dispute did not involve facts or occurrences arising before expiration and did not pertain to rights possibly vested or accrued under the expired contract, "normal principles of contract interpretation" had to

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75. 791 F. Supp. 127 (D. Md. 1992).

76. *Id.* at 129-30.

77. *Id.* at 130.

78. *Id.* (quoting *Litton v. NLRB*, 111 S. Ct. 2215, 2226 (1991)).

79. *Id.*

80. *T & G Constr. Co. v. Sheetmetal Workers' Int'l Ass'n, Local 100*, 791 F. Supp. 127, 130 (D. Md. 1992) (citing *Litton v. NLRB*, 111 S. Ct. 2215, 2225 (1991)).

81. *Id.* at 129.

be consulted in order to make the examination complete under *Litton*. Although not expressing it as part of the *Litton* test, the court did analyze whether the request for arbitration was timely. Concluding, under "normal principles of contract interpretation," that it was not, the court effectively showed that part three of the *Litton* test had not been met.<sup>82</sup> Thus, the dispute was not arbitrable. However, given its disregard of the *Litton* test, the court failed to shed any light on what constitutes "normal principles of contract interpretation."

**F. International Brotherhood of Teamsters v. Pepsi-Cola General Bottlers, Inc.<sup>83</sup>**

In *Pepsi*, the court found that: 1) The employer had no duty under an expired collective bargaining agreement to submit a former employee's grievance to arbitration when the employee's discharge occurred after the expiration date; 2) the Union did not evidence an implied agreement to arbitrate disputes during the hiatus between the expired and new agreements; and 3) the arbitration clause in the new collective bargaining agreement did not apply to the dispute.<sup>84</sup> The court applied part three of the *Litton* test, "normal principles of contract interpretation," and found that arbitration did not survive because the agreement did not explicitly provide for arbitration to continue after expiration.<sup>85</sup> Although acknowledging all three parts of the *Litton* test, the court did not overtly apply them to *Pepsi*. However, it is clear from the facts of the case that the grievance did not involve a right vested or accrued under the contract and did involve facts or occurrences arising before expiration. Despite its failure to formally apply each part of the *Litton* test, the court reached the correct result in finding the dispute not arbitrable because it would not survive under "normal principles of contract interpretation."

**G. NLRB v. McClatchy Newspapers, Inc.<sup>86</sup>**

Although *Litton* did not directly impact the court's ruling in this case, some important questions about the scope of the *Litton* test were raised. The court applied *Litton* and concluded that arbitration provisions

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82. *Id.* at 131-33.

83. 958 F.2d 1331 (6th Cir. 1992).

84. *Id.*

85. *Id.* at 1334.

86. 964 F.2d 1153 (D.C. Cir. 1992).

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that do not survive the expiration of a collective bargaining agreement cannot be imposed unilaterally, even after good faith bargaining to impasse.<sup>87</sup> In this case, the employer could not bargain to impasse and then unilaterally impose its final offer, including an arbitration clause. This result was mandated because *Litton* held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."<sup>88</sup> Although not addressing *Litton's* three part test, *McClatchy* did apply *Litton* for its concurrence with *Hilton-Davis* that arbitration is a creature of contract and will not be imposed without mutual consent.<sup>89</sup>

### H. Winery, Distillery and Allied Workers, Local Union 186 v. Guild Wineries and Distilleries<sup>90</sup>

In *Guild Wineries and Distilleries*, the court held that the employer was not required to arbitrate the issue of whether it had a continuing obligation to pay for its former employees' health insurance under an expired collective bargaining agreement.<sup>91</sup> Applying the three-pronged *Litton* test, the court found no accrued or vested rights under the contract and no explicit provision for post-expiration arbitration of grievances in the contract.<sup>92</sup> Thus, the "accrued or vested rights" and "normal principles of contract interpretation" prongs of *Litton* were not met. The court appeared to implicitly consider and reject the "facts or occurrences" prong through its discussion of pre-expiration conditions. In upholding the employer's argument against post-expiration arbitration, the court noted that *Litton* had severely weakened *Nolde's* presumption in favor of post-expiration arbitration by limiting it to situations where a dispute has its real source in the contract.<sup>93</sup>

*Guild Wineries and Distilleries*, with minimal discussion, considered and rejected the *Litton* standards, adding little to the study of how the three prongs work in practice. However, *Guild Wineries and Distilleries* appropriately recognized *Litton's* weakening of the *Nolde* presumption favoring post-expiration arbitrability. Thus, *Guild Wineries*

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87. *Id.* at 1171.

88. *Litton v. NLRB*, 111 S. Ct. 2215, 2222 (1991) (quoting *Hilton-Davis Chem. Co. v. Local 342*, 185 N.L.R.B. 241, 242 (1970)).

89. *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1172 (D.C. Cir. 1992).

90. 812 F. Supp. 1035 (N.D. Cal. 1993).

91. *Id.* at 1037-38.

92. *Id.* at 1038.

93. *Id.* at 1037.

and Distilleries served to reinforce *Litton's* narrowing of *Nolde*.

I. *Luden's, Inc. v. Local Union No. 6 of the Bakery, Confectionary, and Tobacco Workers International Union of America*<sup>94</sup>

The contract between *Luden's* and the Union provided for continuation of the contract until a new agreement was reached or until termination by either party upon sixty days notice.<sup>95</sup> After expiration of the agreement and before reaching a new agreement, *Luden's* terminated the contract.<sup>96</sup> The union requested arbitration of a post-termination dispute over retroactive wage increase provisions in the expired contract.<sup>97</sup> *Luden's* refused to submit the dispute to arbitration, claiming that the contract conditioned the duty to pay retroactive wages on continuation of the prior agreement.<sup>98</sup> Because *Luden's* had terminated the contract, it claimed that the duty to arbitrate had been extinguished.<sup>99</sup>

*Luden's* filed suit for a declaratory judgment on the issue of the arbitrability of the retroactive wage dispute.<sup>100</sup> The *Luden's* court determined that the contract properly permitted post-expiration termination during the hiatus between expiration and new contract.<sup>101</sup> The court also found that *Luden's* had properly terminated the contract.<sup>102</sup> Next, the court addressed the issue of whether termination extinguishes an obligation to arbitrate.<sup>103</sup> The court acknowledged *Nolde* for the presumption favoring post-expiration arbitration and *Litton* for its ruling that *Nolde* only applies where a dispute has its real source in the contract.<sup>104</sup>

The court applied the three prongs of the *Litton* test. First, it found that the "facts or occurrences giving rise to the dispute" did not arise until well after termination of the contract.<sup>105</sup> The court cited the parties' failure to agree to a new contract until after termination as the

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94. 805 F. Supp. 313 (E.D. Pa. 1992).

95. *Id.* at 316 n.3.

96. *Id.* at 317.

97. *Id.* at 318 n.6.

98. *Id.* at 320.

99. *Luden's, Inc. v. Local Union No. 6 of the Bakery*, 805 F. Supp. 313, 320 (E.D. Pa. 1992).

100. *Id.* at 316.

101. *Id.* at 321-22.

102. *Id.* at 322-23.

103. *Id.* at 323-27.

104. *Luden's, Inc. v. Local Union No. 6 of the Bakery, Confectionery, and Tobacco Workers Int'l Union of America*, 805 F. Supp. 313, 325 (E.D. Pa. 1992).

105. *Id.* at 326.



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focus of the dispute; therefore, the dispute necessarily arose after termination.<sup>106</sup>

Next, the court analyzed the second prong of *Litton*, "vested or accrued rights." The court found that the right to retroactive wages, like the layoff provision in *Litton*, could not have vested or accrued under the contract.<sup>107</sup> The test for determining whether benefits have accrued is whether they are due and payable on the date when the employer denies them.<sup>108</sup> Because the contract terminated before approval of a new contract, retroactive wages were neither due nor payable, according to the court.<sup>109</sup> The court stated that the right to retroactive wages was strictly a creature of the contract and concluded that *Luden's* had successfully avoided the obligation to pay because the right was neither vested nor accrued at the time of termination.<sup>110</sup>

Under normal principles of contract interpretation, the court found that the retroactive wage right did not survive termination.<sup>111</sup> The contract did not explicitly provide for retroactive wage rights to survive termination.<sup>112</sup> Rather, the contract contained explicit language that made it effective until termination or new contract.<sup>113</sup> Therefore, normal principles of contract interpretation would not support a post-expiration duty to arbitrate.

Based upon the analysis above, the court concluded that the *Nolde* presumption had not been completely negated, that the retroactive wage dispute had not met any of the three *Litton* standards, and that the intent of the parties was not to arbitrate this dispute.<sup>114</sup>

The *Luden's* court did an excellent job of correctly applying the three-pronged *Litton* standard. Recognizing the limitations of *Nolde*, the court proceeded directly to the *Litton* test. After a careful analysis, it reached the well-reasoned conclusion that the test had not been satisfied. Unlike its predecessors in the post-*Litton* era, *Luden's* did not stop after finding one prong of the test applicable or inapplicable. Rather, the court

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106. *Id.* at 323.

107. *Id.* at 323.

108. *Id.* at 326 (citing *E.L. Wiegand Div. v. NLRB*, 650 F.2d 463, 469 (3d Cir. 1981), *cert. denied*, 455 U.S. 939 (1982)).

109. *Luden's, Inc. v. Local Union No. 6 of the Bakery, Confectionery, and Tobacco Workers Int'l Union of America*, 805 F. Supp. 313, 326 (E.D. Pa. 1992).

110. *Id.* at 327.

111. *Id.*

112. *Id.*

113. *Id.* at 326.

114. *Luden's Inc. v. Local Union No. 6 of the Bakery, Confectionery, and Tobacco Workers Int'l Union of America*, 805 F. Supp. 313, 327 (E.D. Pa. 1992).

fully evaluated the dispute under each prong. In a fact pattern that was perhaps the most similar to *Litton* among the cases discussed in this section, the court reached the same conclusion as the *Litton* Court - that there was no duty to arbitrate the post-expiration dispute.

## **V. VIABILITY OF *LITTON***

### **A. *The Litton Standards in Practice***

Although there has been no Supreme Court challenge to or application of the standards of post-expiration survival promulgated in *Litton*, the district and appellate court decisions discussed above provide an indication of how the standards work in practice. The "vested or accrued rights" and "pre-expiration facts or occurrences" standards have not provided a stumbling block for the courts. Where necessary, the courts have been able to clearly determine when a right vests or accrues under an expired contract. Even more clear is the determination of whether pertinent facts or occurrences are pre- or post-expiration events.

The third *Litton* standard, however, has posed a problem in application. The *Litton* court never defined the "normal principles of contract interpretation" standard required to determine whether a right survives expiration. The district and appellate courts, in applying *Litton*, did very little to clarify this standard. Instead, they seemed to establish on an ad hoc basis and without explanation, when "normal principles of contract interpretation" mandated post-expiration survival and when they did not. No determinative elements for normal principles of contract interpretation have emerged. Despite the ambiguity encountered in application of the "normal principles of contract interpretation" standard, *Litton* still provides far more workable standards than its vague predecessors.

### **B. *Is Litton Conceptually Correct?***

Should the arbitration of grievances pursuant to an arbitration clause in an expired contract be mandated only in the limited circumstances permitted by *Litton*? Three possible answers exist to the question of whether *Litton* is a conceptually correct decision. The first position is to always let all terms of an expired contract operate as the status quo until a new contract is formed. This position is unfairly restrictive to both employer and employee. The purpose of setting an expiration date for a contract is to be bound by the contract only during a specified period. Allowing such an unrestricted extension of terms and

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conditions binds the parties to a contract's terms for an indefinite period beyond expiration. This indefinite obligation would leave employers and employees uncertain as to their rights and obligations. The stated term of the contract would become an unreliable indicator of how long the parties would actually be bound.

The second position is that parties should never be bound by any term of an expired agreement. This position would mandate default to statutory and common law provisions during the hiatus. Such provisions might be wholly inadequate for the purpose of enforcing obligations legitimately vested or accrued under the contract, or for grievances concerning pre-expiration facts or occurrences. It would be inequitable to deny arbitration of grievances concerning these two categories simply because the grievances were not filed prior to expiration. Although a right might originate before expiration, it might not vest or accrue until after expiration. Similarly, circumstances might prevent a request for arbitration of pre-expiration facts or occurrences until after expiration. In both of these situations, the grievance would be a product of the contract, but this position would deny resolution according to the terms of the contract. The third position, which is favored by this author, is that the limited allowance of post-expiration arbitration under *Litton* is a fair standard. If parties indicate an intent at the time of contract formation to permit post-expiration arbitration of certain subjects, such intent should be upheld. Although *Litton* provided three standards, only two can realistically be anticipated in the original contract. The parties may create potential rights that will vest or accrue after expiration, or the parties may expressly state an intent that arbitration survive the contract through the hiatus. The third standard, "pre-expiration facts or occurrences," is not completely foreseeable. However, the possibility of a dispute over arbitrability is somewhat reduced under *Litton* if: 1) The parties know a right will vest or accrue after expiration, or 2) the parties expressly provide for post-expiration arbitration, or 3) it is evident that "normal principles of contract interpretation" would mandate post-expiration arbitration. Not only does *Litton* provide a more definite standard than its predecessors by narrowing the *Nolde* "arises under" test, but it also provides a fairer standard. Neither public policy, statutory law, nor common law mandate a result differing from the *Litton* standards.

In comparison to its predecessors, the *Litton* three-pronged test created a far more workable standard for employers, unions, and the courts. The district and appellate cases examined above reveal that each prong of the test works in practice. By narrowing the *Nolde* "arises under" test, *Litton* eliminated much of the accompanying ambiguity. *Litton* created a fairer standard by mandating post-expiration arbitration in three discrete situations. Armed with knowledge of the *Litton* decision,

representatives of labor and employers will be able to create contracts that accurately reflect their post-expiration obligations. Consequently, parties will be better able to avoid future disputes and to distinguish those situations in which post-expiration disputes will or will not be arbitrable.

## **VI. CONCLUSION**

*Litton* is the product of a logical evolution of the unilateral change doctrine and post-expiration arbitration obligations from *Katz* to the present. While recognizing that arbitration is strictly a matter of mutual consent, *Litton* concluded that a presumption of continued mutual consent may sometimes be appropriate after the contract expires. By carefully limiting the situations in which such extension is permissible, *Litton* created both an equitable and a workable standard for the evaluation of grievances in the often ambiguous context of the post-expiration hiatus.

*Diane Fox*